

MINUTES
REGULAR MEETING OF THE BOARD OF LAND COMMISSIONERS
Monday, April 19, 2004, at 9:00 a.m.
State Capitol Building, Room 303

PRESENT: Lt. Governor Karl Ohs, Superintendent of Public Instruction Linda McCulloch, Secretary of State Bob Brown, and Attorney General Mike McGrath

VIA PHONE: State Auditor John Morrison

Motion was made by Mr. McGrath to approve the minutes from the regularly scheduled meeting of the Board of Land Commissioners held March 15, 2004. Seconded by Ms. McCulloch. Motion carried unanimously.

BUSINESS TO BE CONSIDERED

1003-3 FINAL APPROVAL LAND EXCHANGE – JACOBSON

On October 20, 2003, the Land Board gave unanimous preliminary approval to proceed with the analysis of the exchange and this request is for final approval. The exchange is located by Ovando, Montana, and involves the exchange of eight acres of state land, previously a railroad right-of-way, to the Jacobson's for 21 acres of forested land adjacent to other state land. All of the applicable six land exchange criteria have been met or exceeded, and consequently, it is the department's determination that this land exchange is in the best interest of the trust beneficiaries. Mr. Clinch requested final approval on the exchange.

Motion was made by Mr. Brown to approve the Jacobson Land Exchange. Seconded by Mr. McGrath. Motion carried unanimously.

404-1 SALE OF REAL PROPERTY – Montana Tech to Butte Local Development Corp.

Mr. Clinch said this is before the Board at the request of the Board of Regents. It is a sale of 12.694 acres of land located in Industrial Park in Butte. LeRoy Schramm, Legal Counsel, Board of Regents will present the details. Mr. Clinch said within the Board's packet are the appraised value of the property, the sale value, and a brief description of the process to date. The Regents' policy is that once the requirements of §20-25-307, MCA, have been met, this item is to come before the Board of Land Commissioners for approval.

LeRoy Schramm, Legal Counsel, Board of Regents, said he didn't have much to add to what Mr. Clinch said. No one appeared before the Board of Regents on this sale, and it is not a controversial item. The sale price is 60% above appraised value. The letters from the Butte-Silver Bow Historic Preservation Office and the State Historic Preservation Office state that this is not culturally sensitive or heritage property. All of the requirements of the statute have been met. Mr. Schramm requests concurrence in the sale.

MINUTES
April 19, 2004
BOARD OF LAND COMMISSIONERS
Page 2

Motion was made by Ms. McCulloch to approve the sale of real property. Seconded by Mr. Brown. Motion carried unanimously.

404-2 COMMUNITIZATION AGREEMENT(S)
Fidelity Exploration & Production Company – four CA requests:
(Section 22, SE¼ and SW¼ ; Section 27, SE¼ and NE¼)

Mr. Clinch said this is a package submitted by Fidelity Exploration and Production Company and involves authorization for the department to enter into Communitization Agreements. Communitization Agreements are agreements that brings small parcels together so they can comply with the Board of Oil and Gas' spacing units. In this area, the spacing units are 160 acres. In each of these, the individual owners own less than that and, consequently, this request brings all of those ownerships together so they can share equitably in the production of oil and gas from that tract. This request is on four different quarter sections within two sections with multiple wells at each location. It is important to know that in all these locations, the wells are drilled on property other than state property. If not for the Communitization Agreement, the state would not be involved with the royalty associated with this. The department has a large percentage in each of these, and through the Agreement, it will be getting it's share of the royalties through methane production. Mr. Clinch requested approval.

Motion was made by Ms. McCulloch to approve the Communitization Agreement requests. Seconded by Mr. McGrath. Motion carried unanimously.

404-3 DOG MEADOW SOUTH TIMBER SALE

This proposed timber sale is located approximately 15 miles NW of Whitefish, Montana, and will occur on portions of nine separate sections. There will be 16 individual harvest units comprising a total of 620 acres of harvest. The projected volume is 4,778,000 board feet. The purpose of the sale is to carry out a variety of silvicultural prescriptions to remove decadent and overstocked trees, ultimately trying to convert the timber stands to resemble historic conditions. Access to the sale is through an extensive existing road system. Only .2 of a mile of new road construction is proposed, although there will be nearly 13 miles of road upgrade, maintenance, and improvements to the existing road system. The department's archaeologist performed a records search and found no historical or cultural sites. Public comment was solicited through direct mailing and newspaper ads. Comments received have been incorporated and mitigation measures have been developed in response. There will be no significant environmental impacts as a result of this sale. It is the department's projection, based on current prices, that this sale will generate \$850,000. In addition, a \$9.93/ton Forest Improvement Fee will be charged. Mr. Clinch requested approval of this sale.

Motion was made by Mr. Brown to approve the Dog Meadow South Timber Sale. Seconded by Mr. McGrath. Motion carried unanimously.

MINUTES
April 19, 2004
BOARD OF LAND COMMISSIONERS
Page 3

404-4 RIGHTS-OF-WAY APPLICATIONS

This month there are 25 rights-of-way applications for approval. Most of the requests are for utility corridors involving electric co-ops. However, the last request is an extensive right-of-way with the Bureau of Land Management (BLM) in Southeastern Montana. It is a sale of right-of-way across various portions of a large block of state land to grant a perpetual non-exclusive easement to the BLM to access their lands. It is one that has been developed in a cooperative approach. It brings a large block of both trust land and BLM land to public access and will provide much needed recreational access. Mr. Clinch noted that the settlement with the department's lessee is still pending, however, he said it does not change or jeopardize this. Approval of this right-of-way to the BLM is pending, as is the department's settlement with its lessee or their assignee relative to damage to those tracts. Mr. Clinch requested approval.

Motion was made by Ms. McCulloch to approve the entire rights-of-way packet. Seconded by Mr. Brown. Motion carried unanimously.

PUBLIC COMMENT

Mr. Clinch said Mr. Doug Boutilier is here to speak and I want to give the Board some background information first. Mr. Boutilier has a pending right-of-way application before this department and, in fact, it has been pending for nearly a year. As I understand it, he approached the department to secure a right-of-way across adjacent state land. Until recently, he thought the process was a "go and approval" process. He came to the meeting last month under the impression that his right-of-way request would be before the Board. Mr. Clinch said, frankly, the department's involvement in this has been a little bit less than perfect. We've made a number of mistakes, we've misled Mr. Boutilier. He has spent a considerable amount of time, energy, and money pursuing something only to find out a year later that the department was going to oppose it. Depending upon where we go with Mr. Boutilier's testimony, we may need to re-review. He said he is prepared to hear from Mr. Boutilier that within the department there was miscommunication regarding approval, and I am here to say there is a fair amount of truth to that.

Doug Boutilier, Helena, said the purpose of the easement we're asking for is as a Christmas present I gave two acres to my daughter and son-in-law, Sara and Cliff Wakefield, to build a home on the east end of my property, which is adjacent to the state land I am asking for an easement through. I am not here to sling mud. Hopefully we can find some positive ways to get this done. There are three alternative ways to get to the two acres. Two of which require crossing state land. There was some discussion about coming in from the west side where my home is, but that would require a road about one foot away from my house, and it would go over the top of my well. I can't see how that would be an alternative. I would like to speak to the two other alternatives that require crossing state land. The land we're talking about is on the west end of town, behind Lombardy Drive. I lease that now and run my horses there, I have corrals there. If an easement is granted beside the corrals, I would move my corrals and put in a parking pad for public access. That state land was given to the state and I can't promise you that I can get everybody on Lombardy Drive happy, but as we speak, there is no access to that property whatsoever. There is only one place to park and up until a few days ago, there was a sign there that read "No Parking" and if you parked there your car would be towed away. If an

MINUTES
April 19, 2004
BOARD OF LAND COMMISSIONERS
Page 4

easement is granted in what I call Alternative 1, beside the corrals, I would at my expense put a pad in there for public parking. The easement I had assumed I would get approval for, until last month, is along the western edge of the state land, 25 feet along an existing fence line. If I went up that, it would be 25 feet up the fence line to my daughter's home. I can't see where that would be a detriment to the state. Speaking to the value, I am prepared to give five acres of additional ground to the state, I own 100 acres in that particular lot. I've got a building worth about \$70,000 that is paid for which is on a long-term lease to Northwest Energy for \$660/month, not a lot of money, but it's money the state can have. He said he'll give five acres and the building to the state if he can have an easement across state land. That easement will also provide access for the general public. As far as value to the existing property owners, I had an appraiser out and the last home we'd pass going to my daughter's proposed home is 38 yards from the proposed fence line easement. The homes on Lombardy, average 19-21 yards off of Lombardy Drive. To say I am hurting value by being 38 yards away by adding a road, the roads we go by are 19-21. I can't see the value depreciation. The state can put restrictions on the lot that I can't sell it or that no other homes can use it. I am not trying to develop a subdivision, I am simply trying to get one lot for one home. That's all I need approval for. He said he would like to be on the May agenda and to meet with the advocates from DNRC to work something out.

Cliff Wakefield, Helena, said he would like the Board to review the offer that has been made. This is a single family dwelling and they are not looking to subdivide the property.

Mr. McGrath said he met with Mr. Boutilier the other day and most of his staff has too. And he went out and looked at the site. He understands the department is going through the programmatic EIS and trying to make decisions on how to deal with property like this in a uniform manner and to do some planning. He thinks this is an opportunity that is unique and presents a potential win-win possibility. He asked that the Board put this on the agenda for May, and that the staffs work with Mr. Boutilier and others to work out the value issues. He said his interest in particular would be the public access issue. There is an extensive trail system on Mt. Helena that has little or no access from the west side. This presents an opportunity for that public access. There would be a need for some kind of parking pad. Access to the south side of this state section is bordered by Forest Service land and it moves right into the Mt. Helena trail system. There is great opportunity here for public use that trumps the need to have the programmatic EIS completed. He requested this be on the Board agenda for May.

Mr. Clinch said since this application was originally before the department there have been new developments, particularly the issue of providing access to the public, as well as opportunity for reimbursement to the trust. So there are enough new differences that without a doubt we can go back and look at it. Part of the reason this is before the Board is that some years ago the department started to get a number of easement requests across state land by adjacent landowners. It was the fear of the previous Board that in some instances those landowners were trying to site their roads on state land rather than use any of their valuable private land to gain access to their property. As a result, that previous Board adopted a policy that tried to give the department guidance against haphazardly issuing easements to people that were primarily to the benefit of the private property owner in siting roads on state land. The policy states, "...if there is no access to that property through the applicant's own property," and the department has used that as a guide. That is partly what brought us to this mixed up situation here, the debate among staff as to whether this two-acre tract Mr. Boutilier is talking about is really

MINUTES
April 19, 2004
BOARD OF LAND COMMISSIONERS
Page 5

accessible by an extension of his road from his house or not. We can have a debate on that now but, frankly, the addition of information now about the purpose of this road being to provide public access certainly gives the department more than ample reason to deviate from that policy even if that was true. As Mr. McGrath stated, there has been considerable interest in wanting public access to the area to the south. Even though a road exists to the corner where the public could legally park, that has not worked out well with adjacent landowners. The proposal of putting a road into the tract and establishing a public parking area is a win-win situation and I think it more than justifies a reason to re-evaluate the application. He directed the department to go back and look at the application, work out the details with Mr. Boutilier, and come back before the Board in May with a proposal.

Mr. Morrison said he wanted to second Mr. McGrath's comments and see if there is some way to accommodate this request, the public access potential is a significant consideration that the Board should look at.

Mr. McGrath said he had one issue to bring to the Board's attention. There is private litigation that is ongoing regarding the location of several hydro dams in the State of Montana and there is a suit. It is a private Attorney General's action filed by the Great Falls School District. It is some individuals challenging PP&L Montana, as well as Avista, alleging that they have committed a trespass on state property because they have, as it turns out, no easements granted by the state for the dams in the Great Falls area, the Ennis Dam, and Avista's dam at Noxon. Normally as a matter of course, we require easements if you build a bridge, run a pipeline, or do anything across the bed and bank of a navigable river, which is owned by the state. There is a requirement for obtaining an easement and generally some compensation to the state. The status of the litigation is that the Defendants have filed a Motion to Dismiss and one of the arguments they have made is that this cannot be brought as a private action, the State of Montana is a necessary party to this litigation. This has been brought to the Attorney General's attention and his office has received the request from the Plaintiffs to join in the litigation on behalf of the state as a necessary party. Mr. McGrath said I have talked to legal counsel at the Department of Revenue (who is currently engaged with PP&L on a tax issue) I wanted to know if this was an issue that concerns them. It doesn't raise any particular problems, their issue is independent of this and shouldn't affect that. His staff has had discussions with counsel at DNRC. He wanted the Board to know that it is likely that within the next few days he will join that litigation on behalf of the state. I do think the state is a necessary and indispensable party and we ought to be involved now rather than defend a challenge in the next couple of years as to why we weren't involved.

Tommy Butler, DNRC Legal Counsel, said it is important that the Board recognize the nature of navigable waters and title to navigable waters. Navigable waters was not granted to the State of Montana, they are lands held by the state by virtue of its sovereignty under what is called the Equal Footing Doctrine. The original 13 colonies were held to be sovereign, much like the King of England, and the King held all navigable waters. The Supreme Court later held that all subsequent states, like the original 13, would enter on an equal footing with the original 13 states, and would own by virtue of their own sovereignty, waters underneath navigable lakes and streams. The distinction is important. If lands are granted, those are school trust lands. Lands that are held by means of sovereignty are just sovereign lands of the state. We're not under a trust obligation to get full market value. The Attorney General is absolutely correct that

MINUTES
April 19, 2004
BOARD OF LAND COMMISSIONERS
Page 6

whenever we have an application, even from the Department of Transportation for a bridge across a navigable stream, it is incumbent upon this Board to review that application for that easement because that is a use of state land. The U.S. Supreme Court has repeatedly recognized in at least two cases, Federal Power Commission v. Niagara Mohawk Power and U.S. v. Virginia Electric & Company, that the state's right under the Equal Footing Doctrine to control navigable waterways is subject to the superior navigational servitude held by the federal government. What that means is the federal government gets to control navigable waterways to the exclusion of the state's rights in the stream itself. And in those two cases cited above, the U.S. Supreme Court held that the navigational servitude, is superior to the state's right to control its waters, which includes the placement of dams. It would be useful for this Board to further explore that concept about the navigational servitude before we enter into the litigation.

Mr. McGrath said he is not asking the Board to enter into the litigation for several reasons. One is because we're not talking about trust lands. I am just advising you that I am likely going to do this as Attorney General for the State of Montana. We are aware of those cases Mr. Butler cited and the federal pre-emption issues, we think they can be distinguished that they don't address the issue of whether there should be some kind of fair compensation. We're spending hundreds of hours in my department now dealing with the Milltown Dam and related issues, and obviously, the Federal Energy Regulatory Commission has a role in the decommissioning of that dam. But, nevertheless, the owners of the dam and ARCO are responsible to the state for damages done to the state's natural resources. Those requirements are not precluded by federal pre-emption issues, nor do I think that the issue of requiring easements or compensation for trespass is precluded by federal pre-emption. But that is the point of the litigation and we would get involved on behalf of the state not the Board to resolve that issue.

Motion was made by Mr. Brown to adjourn. Seconded by Ms. McCulloch.
Meeting adjourned.